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No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID M. DALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 16, 1998

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Questions Presented for Review

1. In a federal criminal prosecution tried to a jury, does the failure to submit an essential element of the crime for jury determination, in violation of this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995), constitute "actual prejudice" per se under the cause-and-prejudice doctrine enunciated by *United States v. Frady*, 456 U.S. 152 (1981), as applied to a motion under 28 U.S.C. § 2255?

2. Should the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) be confined to its original context of state prisoner petitions only?

List of Parties

The proceeding below was a motion by Petitioner David M. Dale under 28 U.S.C. § 2255, in which the only other party was the United States. In the original federal criminal prosecution, the defendants were:

(1) David M. Dale, the Petitioner herein;

(2) Michelle Ashton;

(3) Martin Segal;

(4) Automated Data Management, Inc.; and

(5) Terence Sweeney.

Table of Contents

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Allowing the Writ	10
Conclusion	21

Table of Authorities

Page(s)

Cases:

Agostini v. Felton, 117 S. Ct. 1997 (1997) 19-20

Arizona v. Fulminante, 499 U.S. 279 (1991) 10

Bilzerian v. United States, 127 F.3d 237 (2d Cir. 1997) 12

Bousley v. United States, — U.S. — , 118 S. Ct.1604 (1998) 15, 16, 17

California v. Roy, — U.S. — , 117 S. Ct. 337 (1996) 11

Coleman v. Thompson, 501 U.S. 722 (1991) 16

Davis v. United States, 417 U.S. 333 (1974) 19

Desist v. United States, 394 U.S. 244, 256 (1969) 18

Duncan v. Louisiana, 391 U.S. 145 (1968) 18

Engle v. Isaac, 456 U.S. 107 (1982) 15

Gideon v. Wainwright, 372 U.S. 335 (1965) 18

Gilberti v. United States, 917 F.2d 92 (2d Cir. 1990) 17

Harmon v. Marshall, 69 F.3d 963 (9th Cir. 1995) 12

Henderson v. Kibbe, 431 U.S. 145 (1977) 15

Cases, continued: **Page(s)**

Johnson v. United States, 117 S. Ct. 1544 (1997) .... passim

Linkletter v. Walker, 381 U.S. 618 (1965) 18

Mackey v. United States, 401 U.S. 667, 675 (1971) 18

Mapp v. Ohio, 367 U.S. 643 (1961) 18

Murray v. Carrier, 477 U.S. 478 (1986) 15, 16

Palko v. Connecticut, 302 U.S. 319 (1937) 18

Robinson v. California, 370 U.S. 660 (1963) 18

Schlup v. Delo, 513 U.S. 298 (1995) 16

Sullivan v. Louisiana, 508 U.S. 275 (1993) ..... passim

Teague v. Lane, 489 U.S. 288 (1989) 16-20

United States v. Ayala, 894 F.2d 425 (D.C. Cir. 1990) ... 17

United States v. David, 83 F.3d 638 (4th Cir. 1996) 11

United States v. Dedhia, 134 F.3d 802 (6th Cir 1998) ... 12, 13

United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) 12, 13-14

United States v. DiRico, 78 F.3d 732 (1st Cir. 1996) 11

United States v. Frady, 456 U.S. 152 (1982) ..... passim

Cases, continued: **Page(s)**

United States v. Gassaway, 966 F. Supp. 1054 (W.D. Okl. 1997) 13

United States v. Gaudin, 515 U.S. 506 (1995) ..... passim

United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) 5

United States v. Holland, 116 F.3d 1353 (10th Cir. 1997) 11

United States v. Knapp, 120 F.3d 928 (9th Cir.), *cert. denied*, 118 S. Ct. 417 (1997) 12

United States v. Neder, 136 F.3d 1459 (11th Cir. 1998) .. 12, 13

United States v. Olano, 507 U.S. 725 (1993) 4, 12

United States v. Raether, 82 F.3d 192 (8th Cir. 1996) 12

United States v. Rogers, 118 F.3d 466 (6th Cir. 1997) 12

United States v. Shunk, 113 F.3d 31 (5th Cir. 1997) 11

United States v. Swindall, 107 F.3d 831, 834n.4 (11th Cir. 1997) 17

United States v. West Indies Transport Co., 127 F.3d 299 (3d Cir. 1998) 12

United States v. Wiles, 102 F.3d 1043 (10th Cir. 1996) 11

United States v. Wilkinson, 137 F. 3d 214 (4th Cir. 1998) 13

United States v. Woodward, 149 F.3d 46 (1st Cir. 1998) 13

Cases, continued: **Page(s)**

Van Daalwyk v. United States, 21 F.3d 179 (7th Cir. 1994) 17

Waldemer v. United States, 106 F.3d 729 (7th Cir. 1997) 11, 14

Yates v. Evatt, 500 U.S. 391 (1991) 10

Statutory Provisions:

United States Code:

Title 18:

§ 371 4

§ 1001 ..... passim

§ 1343 4

Title 26:

§ 7201 4

§ 7206 4,5

Title 28:

§ 2255 ..... passim

Rules:

Federal Rules of Civil Procedure, Rule 60(b) 19

Federal Rules of Criminal Procedure, Rule 52(b) 9, 14

Miscellaneous:

2 J. Liebman & R. Hertz, *Federal Habeas Corpus Practice ana Procedure* (2d ed. 1994 & Supp. 1996) 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

DAVID M. DALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner David M. Dale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The majority and concurring opinions of the court of appeals upon the rendering of its judgment on the present 28 U.S.C. § 2255 motion (a1-13)[1] are reported at 140 F.3d 1054 (D.C. Cir. 1998). The district court's opinion (a14-22) is unreported.

Previous opinions by the district court and the court of appeals in the course of the original prosecution and direct appeal are reported at 782 F. Supp. 615 (D.D.C. 1991) and 991 F.2d 819 (D.C. Cir.), *cert. denied,* 510 U.S. 1030 (1993).

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[1] Citations to "a-" are to pages of the appendix to this petition. Citations to "A-" are to pages of the Appendix in the court of appeals.

Jurisdiction

The court of appeals' opinion was issued on April 14, 1998 (a1). An order denying rehearing was entered on June 18, 1998 (a23). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statute Involved

The questions presented involve the construction and application of 28 U.S. C. § 2255, as in effect prior to its amendment in 1996, which provides as follows:

"28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new

trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief by the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

'An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Statement of the Case

This case presents this Court with an appropriate vehicle for determining what—if anything—remains of a citizen's right to seek collateral relief from federal conviction and punishment imposed unlawfully, and in the absence of a constitutionally valid adjudication of guilt by jury verdict, where the legal ground for attack rests upon a decision by this Court handed down after direct appeal has been exhausted but while the defendant remains in federal custody.

In this case, it is uncontested that the Petitioner was unconstitutionally convicted and sentenced on several counts of violating 18 U.S.C. § 1001 in the absence of any jury verdict on the

essential element of materiality, and in fact by a directed verdict for the government on that element, based upon a pretrial ruling by the district court that materiality was satisfied as a matter of law. This was precisely the error later held by this Court in *United States v. Gaudin*, 515 U.S. 506 (1995), to violate the Fifth and Sixth Amendments to the Constitution by depriving a defendant of his right to a jury determination of guilt.

Nevertheless, upon the Petitioner's motion for relief under 28 U.S.C. § 2255, the lower courts in this case have found themselves unable to correct that error. The district court ruled that the application of *Gaudin* was barred by the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), as extended to federal prisoners. On appeal, a majority of the court of appeals applied *Gaudin*, but also denied relief on the alternative ground that the *Gaudin* error did not produce "actual prejudice" within the meaning of *United States v. Frady*, 456 U.S. 152 (1981), as now construed by the court of appeals to incorporate all four parts of the "plain error" test set forth by this Court's decisions in *United States v. Olano*, 507 U.S. 725 (1993), and *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997).

Both grounds relied upon by the courts below present issues that should be considered by this Court.

The Original Prosecution and Direct Appeal

Defendant and Petitioner David M. Dale originally was charged in January 1990, together with four co-defendants—three individuals and a corporation named Automated Data Management, Inc. (hereinafter "ADM")—under a 10-count federal indictment alleging violations of 18 U.S.C. §§ 371, 1001, & 1343, and 26 U.S.C. §§ 7201 & 7206 (A1-34).[2] The focus of the indictment was

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[2] Citations to "A-" are to pages of the Appendix to the Brief for Appellant in the court of appeals. As the defendants were charged with criminal violations of federal statutes, jurisdiction in the court

on alleged tax fraud involving the federal income tax liabilities of ADM, of which the individual defendants were officers and directors. Six of the ten counts of the original indictment were alleged under statutes containing an express element of materiality— four under 18 U.S.C. § 1001 and two under 26 U.S.C. § 7206.

Under the then-settled law, such elements of materiality were considered to present questions of law for determination by the court rather than the jury. *See, e.g., United States v. Hansen,* 772 F.2d 940 (D.C. Cir. 1985), *cert. denied,* 475 U.S. 1045 (1986). On the basis of that prevailing law, the defendants made a pre-trial motion to dismiss the four 18 U.S.C. § 1001 counts—all relating to disclosure questionnaires filed with the Department of Defense—on the grounds that the alleged false statements were immaterial as a matter of law, given that the Defense Department's inquiries were based in national security concerns, which were not implicated by the alleged omissions.[3] By a pre-trial ruling, the district court denied the motion to dismiss. (Order, filed on May 31, 1990). In a memorandum later published to explain the rationale for that pretrial order, the district court also made a finding of the contrary conclusion--that the alleged false statements or omissions *were* material as a matter of law, thus withdrawing that entire issue from consideration on the evidence upon the trial. *United States v. Dale,* 782 F. Supp. 615, 625-26 (D.D.C.

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of first instance was based upon 18 U.S.C. § 3231.

[3] As is detailed in the previous opinions of the district court and the court of appeals in the original instance, the contested omissions in the Defense Department filings concerned ownership interests held by the defendants in Hong Kong companies that were affiliates of ADM and wholly-owned by United States citizens associated with ADM. As no foreign government or national had any interest in these companies, the defendants argued that their omission from the filings could have no national security implication, and therefore were not material to the Department of Defense's concerns in obtaining the disclosure questionnaires, as a matter of both fact and law.

1991); *id.* at 626 ("[T]he Court finds that the alleged false statements are material as a matter of law").

Nevertheless, at the close of the evidence at trial, the defendants moved for a judgment of acquittal on the § 1001 counts, reasserting their defense on materiality, which was again denied.[4] At the charging conference before the district court, the defense did concede--as was the then-settled law--that materiality was a question for the court (Trial Tr. 3878-79). However, the defendants objected to the instruction given to the jury--that the court had found the matters in question to be material, on all of the affected counts--on the ground that this was the equivalent of directing a verdict for the government on a element of the offense (*see* Trial Tr. 3923). Over this objection, the jury was so instructed (*see* A82-83). The jury returned a verdict of conviction on all charged counts, against all defendants, on July 23, 1990.

On direct appeal to the D.C. Circuit during 1992, the defendants continued to attack the legal grounds for the government's case on materiality. In its published 1993 opinion on the direct appeal, the court of appeals addressed and rejected that point on the

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[4] By a memorandum order dated July 11, 1991, denying this motion, the district court noted that "[d]efendants unsuccessfully raised this argument in a pretrial motion," and "[t]o the extent that defendants have set forth the same legal argument here as in the pretrial motion, the Court will deny the motion." In addition, the district court addressed the defendants' further argument that "the evidence at trial was inadequate to demonstrate the materiality of the facts at issue beyond a reasonable doubt" (*id.*), because the government's evidence at trial tended to show that the allegedly material misstatements actually had no effect whatsoever on the Defense Department's actions (*see id.*). That point was rejected by the district court on the ground that it was "premised on a misunderstanding of the materiality requirement," which "does not require an assessment of how the statement at issue actually affected the agency," but rather refers to the "abstract capability" of the statement or omission in question (*id.*).

merits, again under the then-settled view that materiality was a question of law for the court. *See United States v. Dale*, 991 F.2d 819, 834 (D.C. Cir.), *cert. denied*, 510 U.S. 1030 (1993). The court of appeals affirmed all defendants' convictions on all counts, but remanded the case to the district court with instructions to revise the defendants' sentences to eliminate multiplicity between related tax fraud and tax evasion counts, *see* 991 F.2d at 859.[5] Ultimately, the Petitioner was re-sentenced in September 1994 under six counts of conviction: three under 18 U.S.C. § 1001; and one each under 18 U.S.C. § 371, 18 U.S.C. § 1343, and 26 U.S.C. § 7206.[6] Pursuant to that sentencing, Mr. Dale paid fines and other monetary penalties, was incarcerated for three years, and today remains under a sentence of supervised release running until October 1999 (*see* A108-15).

Gaudin and the Section 2255 Proceedings

In June 1995, this Court handed down its decision in *Gaudin*, which reversed the previously-settled law by holding that elements of materiality in federal false-statement offenses were not issues of law to be decided by the court, but rather were issues to be decided by the jury in a federal jury trial.

On February 8, 1996, Mr. Dale moved under 28 U.S.C. § 2255 for relief from his convictions and sentences (A116), on the

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[5] In the meantime, this Court denied certiorari on direct review on December 13, 1993 (No. 93-412).

[6] Four of the six counts involved explicit statutory elements of materiality, and the other two were intertwined with those in the district court's instructions to the jury. In the courts below, the government conceded the vulnerability of the three § 1001 counts to *Gaudin* error, but contested whether the other three counts were affected. Neither the district court nor the court of appeals reached that issue. Both based their rulings on the § 1001 counts.

basis of *Gaudin*.[7] That motion was denied by the district court on February 13, 1997, entirely on the basis of the anti-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989), for state prisoner petitions, which the district court ruled should be extended to federal prisoner motions (*see* a14-22). Mr. Dale appealed the 2255 ruling to the D.C. Circuit on February 21, 1997. After being stayed for several months pending this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997) (regarding the inapplicability of the 1996 amendments to § 2255 to previously-filed motions), the case was briefed and argued during November 1997 through March 1998. Given the basis for the district court's decision, the parties' briefing focused primarily upon the *Teague* issues, which were not addressed by the majority panel opinion ultimately issued.

The Court of Appeals' Decision

On April 14, 1998, a the panel of the court of appeals (Judges Wald, Silberman, and Henderson)[8] affirmed the district court's denial of the 2255 motion, but on the differing grounds of the *Frady* doctrine, on a ruling that the *Gaudin* errors in this case would not satisfy the "actual prejudice" element of *Frady* (*see* a4-6), even if "cause" were satisfied (*see id.* at 5n.4).[9]

The central aspect of the court of appeals' reasoning was the importation into Section 2255 review of this Court's May 1997

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[7] The district court's jurisdiction is provided by 28 U.S.C. § 2255, and the fact that it was the court of original conviction and sentencing.

[8] The majority opinion for the panel originally was signed by Judge Henderson, but later amended by an order of April 24 (a13) to a per curiam opinion.

[9] In a separate concurring opinion (a8-12), Judge Henderson also would have reached the *Teague* analysis relied upon by the district court, and affirmed on that basis as well.

decision in *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997), which analyzed *Gaudin* errors under the "plain error" standards of Rule 52(b) of the Federal Rules of Criminal Procedure, as are applicable to unpreserved error on direct appeal. Under that reasoning, an error does not produce "actual prejudice" within the meaning of the *Frady* doctrine--even if there were adequate "cause" for a procedural default[10]--unless it first passes all four components of the test defined in *United States v. Olano*, 507 U.S. 725 (1993), and applied in *Johnson*, most notably the fourth prong of the *Olano* test that the error--even if plain and affecting substantial rights--also must "seriously affect the fairness, integrity or public reputation of judicial proceedings," *Johnson*, 117 S. Ct. at 1550 (*see* a5-6).

In a separate concurring opinion in the court of appeals, Judge Henderson also would have reached the *Teague* question, and affirmed on that basis in the alternative (a8-12).

On May 29, 1998, Mr. Dale moved for rehearing in the court of appeals, with a suggestion for rehearing *in banc* grounded upon the intra-Circuit and inter-Circuit conflicts created by the panel's opinion, and the inconsistency of the panel's opinion with this Court's decisions in *Frady* and its progeny. On June 18, 1998, rehearing and rehearing *in banc* were denied (a23).

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[10] Though we do not raise the question on this Petition, we note in passing that it is by no means clear that the court of appeals properly analyzed this case as involving "procedural default." As we have described above, trial counsel for Mr. Dale did anticipate the *Gaudin* principle in part, by objecting to the district court's instruction to the jury that materiality element had been directed against the defendants. However, counsel did not insist upon an instruction that permitted the jury itself to determine that element, as *Gaudin* later held. The court of appeals' analysis assumes that, if this is a procedural default, it was one for which there was adequate "cause" within the meaning of the *Frady* doctrine.

REASONS FOR ALLOWING THE WRIT

This Petition presents two important questions concerning the protection of the right to trial by jury and the scope of collateral review available to federal prisoners under 28 U.S.C. § 2255. While the immediate focus of the case on the treatment of *Gaudin* errors under the *Frady* and *Teague* cases is important in itself, the questions presented have broader implications for the proper relationship between direct and collateral review of both state and federal criminal prosecutions, and therefore potentially affect the entire range of criminal jurisprudence supervised by this Court.

I. This Court Should Settle the Circuit Conflicts Concerning the Application of *Frady* to *Gaudin* Errors.

The first question presented by this Petition comprises two subsidiary questions, both of which have created conflicts among the lower federal courts: (a) whether *Gaudin* error should be considered "structural" or "per se" error within the meaning of *Sullivan v. Louisiana*, 508 U.S. 275 (1993), such that harmless-error analysis is inapplicable; and (b) whether collateral review of *Gaudin* error under *Frady* differs from the "plain error" test applied to direct review in *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997).

A. *Gaudin* and Structural Error

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held: (1) that a defective reasonable doubt instruction violated the Fifth and Sixth Amendments; and (2) that such an error can never be harmless, but falls into the category of "structural" error that automatically invalidates a conviction. *See also Arizona v. Fulminante*, 499 U.S. 279 (1991); *Yates v. Evatt*, 500 U.S. 391 (1991). In this situation, no amount of evidentiary support may render the error harmless, because "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal," 508 U.S. at 280, and because the jury guarantee is a "basic protection whose precise effects are unmeasurable, but without which a criminal

trial cannot reliably serve its function," *Sullivan*, at 281.

This Court's 1995 *Gaudin* decision relied in part upon *Sullivan* to hold that the Fifth and Sixth Amendments "require criminal convictions to rest upon a *jury determination* that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt," *United States v. Gaudin*, 515 U.S. 506, 510 (1995)(emphasis added), and further held that this requirement applies to the failure to submit materiality elements for jury determination, specifically in the context of a federal prosecution under 18 U.S.C. § 1001. However, the Court in *Gaudin* did not address the question whether the error involved there was subject to harmless-error analysis, *see Gaudin*, 510 U.S. at 523, 526-27 (Rehnquist, C.J., concurring).

Since *Gaudin* was decided, the courts of appeals have become deeply divided on the question whether *Gaudin*, like *Sullivan*, involves a "structural" or per se error that is not subject to harmless-error analysis, either on direct appeal or on collateral attack, for the purpose of supplying a finding that the jury did not make.[11] The First, Fourth, Fifth, Seventh, and Tenth Circuits have held that *Gaudin* error is structural,[12] while the Second, Third, Sixth, Eighth, and Eleventh Circuits have held that *Gaudin* error is subject to

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[11] This case does not present a situation in which a missing jury finding on an element can be supplied by an unaffected jury verdict on another count, *compare California v. Roy*, — U.S. —, 117 S. Ct. 337 (1996)(per curiam); *see also id.* at 339 (Scalia, J. concurring, joined by Ginsburg, J.) (*Sullivan* and *Gaudin* together require an actual jury finding on every essential element); *United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997).

[12] *United States v. DiRico*, 78 F.3d 732 (1st Cir. 1996); *United States v. David*, 83 F.3d 638 (4th Cir. 1996); *United States v. Shunk*, 113 F.3d 31 (5th Cir. 1997); *Waldemer v. United States*, 106 F.3d 729 (7th Cir. 1997); *United States v. Wiles*, 102 F.3d 1043 (10th Cir. 1996).

harmless-error analysis,[13] and the Ninth Circuit's position remains ambiguous.[14] The D.C. Circuit has held both ways, and thus has an internal conflict: in *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997), one panel held that *Gaudin*-type error was structural; while the decision below in this case, by another panel of the same Circuit, held that *Gaudin* error was subject to harmless-error analysis (a5-6).

Two Terms ago, this Court recognized the issue but avoided a decision in *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997). That case involved direct review of a *Gaudin* error under the "plain error" standards of Rule 52(b) of the Federal Rules of Criminal Procedure, under the four-pronged test developed in the Court's previous decision in *United States v. Olano*, 507 U.S. 725 (1993). In *Johnson*, the Court recognized that the third prong of the *Olano* test— that the error is one "affecting substantial rights"— could be influenced by the classification of *Gaudin* error as structural *vel non*, *see Johnson*, 117 S. Ct. at 1549-50, an issue that the Court's opinion viewed as "by no means clear," *id.* at 1550. However, the Court concluded that "we need not decide that question," *id.*, because the fourth prong of the *Olano* test was not met in that case.

The Court's decision in *Johnson* appears to have deepened the conflict among the Circuits on the question of classifying *Gaudin* under the structural versus harmless-error dichotomy, with some courts— including the court of appeals' opinion below in this case—

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[13] *Bilzerian v. United States*, 127 F.3d 237 (2d Cir. 1997); *United States v. West Indies Transport Co.*, 127 F.3d 299 (3d Cir. 1998); *United States v. Rogers*, 118 F.3d 466 (6th Cir. 1997); *United States v. Dedhia*, 134 F.3d 802 (6th Cir 1998); *United States v. Raether*, 82 F.3d 192 (8th Cir. 1996); *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998).

[14] *Compare United States v. Knapp*, 120 F.3d 928 (9th Cir.), *cert. denied*, 118 S. Ct. 417 (1997), *with Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995).

reading *Johnson* as suggesting that *Gaudin* error is not structural (*see* a5),[15] while other courts have held that the question is unaffected by *Johnson*.[16]

The intra-Circuit conflict within the D.C. Circuit illustrates the broad potential of this uncertainty as affecting a vast number of cases. While the decision below in this case involves a direct application of *Gaudin* to the omission of a materiality element under 18 U.S.C. § 1001, the conflicting decision in *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997), involved the omission of the "enterprise" element from the jury charge on a RICO offense, which the court held to be structural error, on the authority of *Sullivan* and *Gaudin*, and further held that the analysis was unaffected by *Johnson*:

> "The district court's failure to allow the jury to decide the enterprise element was, per se, a reversible error. See Gaudin, 515 U.S. at 510-11; . . . Sullivan, 508 U.S. at 280-83 . . . . The government's reliance on Johnson v. United States . . . as somehow undermining the application of Sullivan's per se prejudicial error rule to a Gaudin error is misplaced. The Court in Johnson engaged in a plain error analysis because the appellant had failed to make an objection to the instruction at trial. It did not decide whether Gaudin errors were per se prejudicial errors that affected a defendant's substantial rights, or rather were subject to a

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[15] Similar suggestions are made in *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998), *United States v. Dedhia*, 134 F.3d 802 (6th Cir 1998), and *United States v. Gassaway*, 966 F. Supp. 1054 (W.D. Okl. 1997)(commenting on the contrary Tenth Circuit rule).

[16] *See United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997); *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998); *United States v. Wilkinson*, 137 F. 3d 214 (4th Cir. 1998).

harmless error analysis."

DeFries, 129 F.3d at 1312n.13 (citations omitted).

The decision avoided in *Johnson* now should be made. The conflict among the Circuits is fully developed, and even balanced. The question has broad importance across a range of cases on both direct and collateral review, potentially in any criminal case where an essential element has been withdrawn from jury consideration.

B. Structural Error, Plain Error, and the *Frady* Standard

Johnson was a direct review case, applying the "plain error" standards under Rule 52(b) of the Federal Rules of Criminal Procedure as developed in *Olano*. Under that test, as apparently interpreted in *Johnson*, even structural error not raised below may be disregarded on direct review unless it also satisfies the fourth prong of the *Olano* test in that it "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Johnson*, 117 S. Ct. at 1550. While many questions might be raised concerning the meaning of that formulation where applicable, the question raised by this Petition is whether that test can be applied as a definition of "actual prejudice" under the cause-and-prejudice standard of *United States v. Frady*, 456 U.S. 152 (1981) and its progeny, as apparently was held by the court of appeals in this case (a4-6).

The ruling below by the court of appeals is in direct conflict with a contrary ruling by the Seventh Circuit in *Waldemer v. United States*, 106 F.3d 729 (7th Cir. 1997), and thus presents a second inter-Circuit conflict. More fundamentally, however, the ruling below—and similar rulings by other lower federal courts—are in conflict with this Court's decisions under the *Frady* doctrine.

The conflict appears from the seminal *Frady* case itself. In that decision, this Court confirmed that "actual prejudice" would be satisfied by a showing that the error in question "amounts to prejudice per se," 456 U.S. at 170, or, in other words, that structural error

would satisfy "actual prejudice" test, as was held in the context of *Gaudin* error by the Seventh Circuit in *Waldemer*. Furthermore, one of the precise holdings of *Frady* was that the plain error doctrine was not applicable on collateral review under 28 U.S.C. § 2255, *see* 456 U.S. at 162-69. While both the plain error and *Frady* doctrines have evolved since that time, we are unaware of any decision by this Court holding or even suggesting that the two doctrines have converged. Certainly, *Johnson* does not purport to be such a decision, as the court of appeals apparently held in this case (a5). And if there is to be a conflation of "plain error" with the cause-and-prejudice doctrine, it should come from this Court, as it requires the overruling of *Frady* and other prior decisions by this Court.

We recognize that the court of appeals' rationale here can be supported by language both from *Frady* and other decisions of this Court—notably *Henderson v. Kibbe*, 431 U.S. 145 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Murray v. Carrier*, 477 U.S. 478 (1986)—suggesting that collateral attack should impose a higher burden on the defendant than direct review, including the plain error doctrine. However, all of those cases were decided before the plain error doctrine took its current form in *Olano*. Moreover, at that level of generality, the court of appeals' rationale, though superficially appealing, is inconsistent with subsequent decisions of this Court developing the *Frady* doctrine, down to and including this year's decision in *Bousley v. United States*, — U.S. — , 118 S. Ct.1604 (1998), and, upon analysis, is revealed to be incorrect and unwise, because it fails to take account of the important functional differences between direct and collateral review.

Collateral review is not a substitute for appeal, or simply a further appeal. The two procedures have different purposes and objectives, and accordingly encompass a different range of issues and should be judged by different standards. To take only one obvious example, newly discovered evidence is a common ground for collateral review, but is almost never considered on direct appeal. Thus, however superficially attractive the idea may be, it simply is not true that collateral review necessarily a "higher" standard; nor should it be true. Collateral review involves different standards devised for a different functions. To import the alien standard of

plain error review on direct appeal, or, as is suggested by the court of appeals decision here, some undefined "higher" standard, would be to destroy the refinements introduced by the development of the collateral review doctrines over the years.

In the case of the *Frady* doctrine, such a transformation essentially would eliminate the "cause" half of the doctrine, by raising the "prejudice" standard to something that is equal to or greater than a "miscarriage of justice," *see Johnson*, 117 S. Ct. at 1550, which is equivalent to the existing *Frady* doctrine for cases in which no "cause" has been shown, *see Bousley v. United States*, 118 S. Ct. 1604 (1998); *Schlup v. Delo*, 513 U.S. 298 (1995); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986). But the "cause" inquiry serves the important purpose of distinguishing between matters that should have been litigated in the original instance and matters that reasonably were not. If the law does not make that distinction meaningful, then *Frady* will not accomplish its purpose of discouraging unnecessary litigation in the first instance by providing some relief when unanticipated events--such as the dramatic change of law involved in this case--do occur. In any case, if *Frady*'s policy of balance in finality is to be changed, then it should be changed by the considered decision of this Court.

II. This Court Should Decide Whether the Anti-Retroactivity Doctrine of *Teague v. Lane* Should Be Extended to Collateral Review Sought By Federal Prisoners.

The second question presented by this Petition does not involve conflicts among the Circuits, but does present an important question that should be decided by this Court, both because of its practical significance to the daily operations of the federal criminal justice system and because of its profound implications for our constitutional structure.

That question is whether the anti-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989) for application to collateral review of state prisoner petitions should be extended to

28 U.S.C. § 2255 motions by federal prisoners. *Teague* does not purport to address that question, and no other decision of this Court does so, though the recent decision in *Bousley v. United States*, — U.S. — , 118 S. Ct. 1604 (1998), appears to assume *Teague*'s applicability to federal prisoner motions, *see* 118 S. Ct. at 1609-10.

In the lower federal courts, there also are a number of decisions that appear to assume *Teague*'s applicability to federal prisoner motions,[17] but, aside from Judge Henderson's concurring opinion below (a8-12),[18] there are only two reasoned court of appeals' opinions on the point: the Second Circuit's decision in *Gilberti v. United States*, 917 F.2d 92 (2d Cir. 1990), and the Seventh Circuit's decision in *Van Daalwyk v. United States*, 21 F.3d 179 (7th Cir. 1994). Both opinions state essentially the same rationale: whereas *Teague* itself rested on the twin pillars of both federal-state comity and "finality" considerations, *see Teague*, 489 U.S. at 308, *Van Daalwyk* and *Gilberti* imply that "finality" alone--unaccompanied by federal-state comity--can support the application of *Teague* under § 2255. However, neither of those cases, nor any other case of which are aware, addresses any of the several problems of law and policy that would be created by the extension of *Teague* to the federal-prisoner context.

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[17] *See United States v. Swindall*, 107 F.3d 831, 834n.4 (11th Cir. 1997)(noting this fact and collecting citations); *United States v. Ayala*, 894 F.2d 425 (D.C. Cir. 1990); 2 J. Liebman & R. Hertz, *Federal Habeas Corpus Practice and Procedure* § 25.6nn.15-19 & accompanying text (2d ed. 1994 & Supp. 1996)

[18] In this case, the district court's decision denying the Petitioner's § 2255 motion rested exclusively upon *Teague* (a14-22). On appeal, though *Teague* was the principal point briefed and argued by the parties, two of the three members of the panel rested the affirmance exclusively upon *Frady*, without reaching *Teague* (a1-7). Only Judge Henderson would have affirmed on both grounds (a8-12).

First, dispensing with the federalism as a basis for the application of *Teague* calls into question whether there is any constitutional basis for the decision. *Teague* itself, and as confined to state prisoners, can be justified as Fourteenth Amendment case reflecting the comity interests as between dual federal and state sovereignty under our constitutional system. Indeed, much of the content of the *Teague* doctrine, and especially its exceptions to the general rule of non-retroactivity in collateral review, harkens back to an earlier era of Fourteenth Amendment jurisprudence represented by *Palko v. Connecticut*, 302 U.S. 319 (1937) and similar cases, since overruled by the selective-incorporation cases of the 1960's, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (4th Amendment); *Robinson v. California*, 370 U.S. 660 (1963) (8th Amendment); *Gideon v. Wainwright*, 372 U.S. 335 (1965) (6th Amendment right to counsel); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (6th Amendment right to trial by jury).[19] However, once *Teague* is extended into the federal-prisoner context, the Fourteenth Amendment can no longer stand between the individual's rights and the government's responsibilities. Stated another way: what part of the Constitution elevates "finality" above the Bill of Rights?

This is not to say that one might not fashion a constitutionalized doctrine of res judicata for federal criminal prosecutions that excludes intervening changes in law, perhaps from Article III or the Due Process Clause, but we are aware of no decisions that do so.

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[19] The principal source for the *Teague* standards was a series of earlier dissenting and concurring opinions by Justice Harlan from the "selective incorporation" era, *see Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), and *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part on the judgments), which essentially were a counter-strategy to the then-expansionary nature of the Court's criminal procedure jurisprudence. Indeed, the entire concept of non-retroactivity of any aspect of this Court's decisions appears to date only from *Linkletter v. Walker*, 381 U.S. 618 (1965).

Second, and aside from the constitutional difficulty, the extension of *Teague* to federal-prisoner motions under 28 U.S.C. § 2255 creates a problem of construing that statute, particularly given the continuing authority of this Court's decision in *Davis v. United States*, 417 U.S. 333 (1974). In *Davis*, this Court held that an intervening change in federal substantive law was cognizable under § 2255, and thus fully retroactive. If both *Teague* and *Davis* are to co-exist in federal prisoner cases, this introduces the complication of distinguishing the non-retroactive scope of *Teague*, stated as rules of "constitutional criminal procedure" from rules of "federal substantive law." Aside from the complexity of this approach, which appears to have been followed both in the lower courts and by this Court's recent *Bousley* decision, *see* 118 S. Ct. at 1609-10, is the difficulty of reconciling the approach with the statutory language of § 2255, which refers to "Constitution" and "laws of the United States" in pari materia, and was so construed by this Court in *Davis*, 417 U.S. at 344-45, which antedated *Teague*.

Third, the application of *Teague* under 28 U.S.C. § 2255 is difficult to reconcile with the more general law of finality or the function of that statute in particular. Unlike the availability of federal habeas corpus for state prisoners, § 2255 serves a role within the federal criminal procedure system that is analogous to the Rule 60(b) of the Federal Rules of Civil Procedure under the federal civil system. A § 2255 motion is not a "collateral" attack in the sense of asking one court to overturn or nullify the effects of another court's judgment; it seeks relief from the rendering court, in the same manner as Civil Rule 60(b). Thus, extending *Teague* as a bar to § 2255 would reverse the ordinary sequence of finality analysis, and create the anomalous result of conferring more finality on criminal than on civil judgments.

This is illustrated by comparing this Court's recent decision in *Agostini v. Felton*, — U.S. — , 117 S. Ct. 1997 (1997), which granted relief under Civil Rule 60(b)(5) from a 12-year-old permanent federal injunction barring a public school district from sending its teachers into parochial schools, in light of intervening changes in First Amendment law. In granting that relief on "collateral attack," this

Court applied a well-established line of authority permitting relief from judgments imposing continuing obligations, where there had been "a significant change either in factual conditions or in law," *Agostini,* 117 S. Ct. at 2006. In reaching that conclusion, the Court cited *Davis* in support, and pointedly distinguished *Teague* as "applying a more stringent standard for recognizing changes in law and 'new rules' in light of the 'interests of comity' present in federal habeas corpus proceedings," *Agostini,* 117 S Ct. at 2018.

Finally, it is by no means clear that applying both *Frady* and *Teague* to federal prisoner motions under § 2255 serves any rational purpose of any kind, much less one that would justify the complications introduced by *Teague*. *Frady* itself is based upon and vindicates a policy of finality in federal criminal judgments. By definition, any change of law cognizable under *Frady* would be one that was both reasonably omitted from the original litigation ("cause") and significant to liability ("prejudice"). Thus, the only incremental effect of *Teague* in this context would to bar the correction of errors whose recognition would promote both efficiency and fairness—a result that does not commend itself as sound policy.

While we have delved into the merits somewhat in presenting this question, we believe that it is important to the exercise of the Court's discretion that none of the foregoing points have been addressed by any reported decision of which we are aware, notwithstanding the relatively common application of *Teague* to federal prisoner motions in the lower federal courts. We suggest that this question deserves far more serious consideration than it has received to date, and should be taken up for review by this Court.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September 16, 1998

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 1998 Decided April 14, 1998

No. 97-3023

UNITED STATES OF AMERICA,
APPELLEE

v.

DAVID M. DALE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 90cr00027-01)

Jeffrey S. Parker argued the cause for the appellant.

Stuart G. Nash, Assistant United States Attorney, argued the cause for the appellee. *Mary Lou Leary*, United States Attorney at the time the brief was filed, and *John R. Fisher*, *Mary Patrice Brown*, *Thomas R. Eldridge* and *Mark H. Dubester*, Assistant United States Attorneys, were on brief.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, SILBERMAN and HENDERSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Appellant David M. Dale invokes the federal habeas corpus statute, 28 U.S.C. § 2255,[1] to challenge his fraud and conspiracy convictions on the ground that under *United States v. Gaudin*, 515 U.S. 506 (1995), issued after Dale's convictions became final, the district court erroneously decided as a question of law, rather than remitting to the jury as a question of fact, the materiality of misrepresentations for which Dale was convicted of violating 18 U.S.C. § 1001.[2] Because Dale failed either

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[1] Section 2255 provides in relevant part:

> **Federal custody; remedies on motion attacking sentence**
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

[2] Section 1001 provides in relevant part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a *material* fact;
>
> (2) makes any *materially* false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any *materially* false, fictitious, or fraudulent statement or entry;

to raise the alleged error during his criminal prosecution or to establish in this proceeding "cause and prejudice" to excuse his procedural default, we conclude that he is not entitled to the relief he seeks.

The details of Dale's charged offenses and of his trial are set out at length in *United States v. Dale*, 991 F.2d 819 (D.C. Cir.), *cert. denied*, 510 U.S. 1030 (1993), (*Dale I*) and it is unnecessary to repeat them here. At the end of the day the jury convicted Dale of conspiracy (18 U.S.C. § 5371) (count 1) and of six substantive offenses: subscribing to a false tax return (26 U.S.C. § 7206(1)) (count 2); attempted tax evasion (26 U.S.C. § 7201) and aiding and abetting therein (18 U.S.C. § 2) (count 4); wire fraud (18 U.S.C. § 1343) and aiding and abetting therein (18 U.S.C. § 2) (count 5); concealing facts by trick, scheme and artifice (18 U.S.C. § 1001) and aiding and abetting therein (counts 7 and count 9); and making false statements (18 U.S.C. § 1001) and aiding and abetting therein (18 U.S.C. § 2) (count 10). Before deliberations the judge had expressly instructed the jury that the misrepresentations alleged in violation of section 1001 (counts 7, 9 and 10) "are material." App. A82. On July 15, 1991 the trial judge sentenced Dale to 41 months' imprisonment on the conspiracy count and a concurrent 30-month sentence on each of the other 6 counts, to be followed by 2 years' supervised release. The judge also imposed a $350 special assessment, a $675,000 fine and a $58,000 assessment for incarceration costs. In an opinion issued April 6, 1993 we affirmed Dale's convictions and sentence with one exception—we reversed the count 2 conviction of subscribing to a false tax return, which merged with the count 4 conviction of attempted tax evasion, and remanded for appropriate resentencing. *See Dale I.* The United States Supreme Court denied Dale's petition for certiorari on December 3, 1993. *Dale v. United States*, 510 U.S. 1030 (1993). The district court resentenced Dale on August

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shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001(a) (emphasis added).

24, 1994 in accordance with our remand. No appeal was taken from the new sentence.

On June 19, 1995 the United States Supreme Court issued its decision in *United States v. Gaudin*, holding that because materiality is an element of a section 1001 offense the Fifth and Sixth Amendments to the United States Constitution require that a conviction thereof rest on a *jury* finding of materiality. On February 8, 1996 Dale filed a motion in the district court for collateral relief from his convictions pursuant to 28 U.S.C. § 2255 on the ground that under *Gaudin* the trial judge usurped the jury's function by ruling as a matter of law that the misrepresentations alleged in counts 7, 9 and 10 were material. The district court denied the relief sought, concluding that *Gaudin* established a new rule of constitutional procedure that should not be retroactively applied to criminal convictions already final at the time the decision issued. Without reaching the retroactivity issue, we affirm the district court on the ground that Dale is procedurally barred from arguing *Gaudin* error in a habeas proceeding. Having failed to argue in his criminal prosecution that materiality was a jury issue, either before the district court or on appeal, Dale now "must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167–68 (1982). To establish "actual prejudice," he "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170.[3] Dale has failed to meet his burden.[4]

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[3] It is not clear whether the showing of prejudice required to cure procedural default is identical to—or greater than—the showing required to establish ineffective assistance of counsel, namely, that "there is *a reasonable probability* that, but for [the errors], the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (emphasis added). *See United States v. Walling*, 982 F.2d 447, 449 (10th Cir. 1992); *Freeman v. Lane*, 962 F.2d 1252, 1258–59 & n.5 (7th Cir. 1992); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Proce-*

The three section 1001 convictions were based on Dale's failure to disclose interests in and relationships with foreign corporations on forms he filed with the Department of Defense to obtain security clearance. *See Dale* I, 991 F.2d at 828–29. In each case the filed form specifically requested the information withheld and Dale has suggested no facts or theory to rebut the district judge's legal conclusion that the charged nondisclosures were material to the Department's decision whether to grant clearance. Nor did Dale—or his co-defendant charged with the same nondisclosures—attempt to challenge the judge's materiality conclusion on direct appeal. In the absence of any basis for finding Dale's misrepresentations were not material, we cannot say that the judge's failure to submit materiality to the jury "worked to [Dale's] actual and substantial disadvantage." The failure therefore was not prejudicial.

Dale asserts that a *Gaudin* error "cannot be harmless, because it requires speculation about what a hypothetical jury could have decided, had it been allowed to do so." Reply Br. at 17 (citing *Waldemer v. United States*, 106 F.3d 729, 731–32 (7th Cir. 1997)). We disagree. In *Johnson v. United States*, 117 S. Ct. 1544, 1550 (1997), the Supreme Court held that the trial judge's *Gaudin* error was not "plain error"—so as to justify reversal on direct appeal in the absence of an objection made at trial—where "the evidence supporting materiality was 'overwhelming,' materiality was "essentially uncontroverted" and the appellant "presented no plausible argument"

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dural Default in Federal Habeas Corpus, 57 U. Chi. L. Rev. 679, 684–85 n.25 (1990). Circuit precedent suggests that habeas prejudice may require a greater showing, namely, "*by a preponderance of the evidence*, that the outcome of his trial would have been different but for the errors in question." *See United States v. Saro*, 24 F.3d 283, 287 (D.C. Cir. 1994) (emphasis added). In any event, the standard has not been satisfied here.

[4] Because we find no showing of prejudice we need not decide whether Dale has satisfied the "cause" prong of the default standard.

that the charged misrepresentation was not material. We can only conclude that the same error can in similar circumstances be nonprejudicial under the *habeas* standard which requires a "showing of prejudice" that "is significantly greater than that necessary under 'the more vague inquiry suggested by the words "plain error."' " *See Murray v. Carrier*, 477 U.S. 478, 493 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)); *see also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal."); *United States v. Saro*, 24 F.3d 283, 287 (D.C. Cir. 1994) (quoting *Murray v. Carrier*, 477 U.S. at 494).[5]

Finally, Dale argues—belatedly and improvidently in a post-argument letter filed with the court on March 20, 1998 purportedly pursuant to Local Rule 28(j)[6]—that, even if he

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[5] In *Waldemer v. United States*, 106 F.3d 729 (7th Cir.1996), on which Dale relies, the Seventh Circuit concluded a *Gaudin* error was necessarily prejudicial because the government could not "demonstrate that [the petitioner's] trial jury actually determined that the statements were material," stating: "Our cases hold ... that if an element of an offense is not actually found by a jury, appellate court musings as to the actions of a hypothetical rational jury cannot render such an error harmless." 106 F.3d at 732. The Supreme Court's subsequent decision in *Johnson* establishes that, to the contrary, an actual jury finding of materiality is not necessary to render a *Gaudin* error harmless.

[6] Rule 28(j) provides:

> When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall *without argument* state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

has not demonstrated prejudice he is entitled to collateral relief to prevent a "miscarriage of justice." It is true that a showing of "fundamental miscarriage of justice" may excuse default when cause and prejudice are not shown. *See Schlup v. Delo*, 513 U.S. 298 (1995); *United States v. McKie*, 73 F.3d 1149 (D.C. Cir. 1996). The petitioner must then "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,' " that is, that "it is more likely than not that no reasonable juror would have convicted him" but for the error. *Schlup*, 513 U.S. at 326 (quoting *Murray v. Carrier*, 477 U.S. at 496). Having concluded that Dale failed to meet the habeas prejudice standard, we do not think he can possibly claim a miscarriage of justice which requires "a stronger showing than that needed to establish prejudice." *Id.* We therefore reject this last ditch argument.

For the foregoing reasons the judgment of the district court is

Affirmed.

D.C. Cir. R. 28(j) (emphasis added).

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

I agree with the majority opinion that, having failed to object to the judge's materiality determination at any stage of his criminal prosecution and having failed to establish in the habeas proceeding that he was prejudiced by the determination, Dale would be procedurally barred from raising the *Gaudin* error—if he were otherwise entitled to its benefit. He is not. In *Teague v. Lane*, 489 U.S. 288 (1989), a plurality of the United States Supreme Court declared: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. The plurality set out two exceptions to the general rule: (1) "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)); and (2) "a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are implicit in the concept of ordered liberty,'" *id.* (quoting *Mackey*, 401 U.S. at 693) (internal quotation omitted). A majority of the Court has since repeatedly applied both the *Teague* plurality's retroactivity rule and its two exceptions. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333 (1993); *Saffle v. Parks*, 494 U.S. 484 (1990); *Butler v. McKellar*, 494 U.S. 407 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989). I believe that *Gaudin* established the kind of new rule of constitutional procedure governed by *Teague* and that it fits within neither of the two *Teague* exceptions. I therefore conclude, as did the district court, that *Gaudin*'s holding does not apply retroactively to Dale's convictions.

As a threshold matter, to come under *Teague*'s retroactivity regime, an intervening court decision must produce "a new constitutional rule of criminal procedure." That the *Gaudin* rule, which derives from a defendant's Fifth and Sixth Amendment rights, is a constitutional one cannot be doubted. The rule is plainly also one of procedure—it simply dictates

who must decide the statutory element of materiality—it tells us nothing of what constitutes a substantive violation of the statute. *Cf. United States v. McKie*, 73 F.3d 1149, 1151 (D.C. Cir. 1996) (court's interpretation of "substantive terms" of criminal statute is not "procedural" rule subject to *Teague*). Moreover, I believe the *Gaudin* rule was also a "new" rule when formulated.

The Supreme Court acknowledged in *Teague* that "[i]t is admittedly often difficult to determine when a case announces a new rule" and it would "not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes." *Teague*, 489 U.S. at 301; *see also Mackey*, 401 U.S. at 667, 693 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("[I]n *Desist* [v. United States, 394 U.S. 244, 263 (1969)] I went to some lengths to point out the inevitable difficulties that will arise in attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.' I remain fully cognizant of these problems. . . ."). The *Teague* Court nevertheless offered guidance for deciding which rules are "new" ones: "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis original). The *Gaudin* rule comes easily within the latter characterization. Not only was *Gaudin*'s holding "not dictated by precedent existing at the time," it was *contrary to* both Supreme Court precedent and that of a large majority of the circuit courts of appeal.

As the Supreme Court noted, the holding in *Gaudin* was inconsistent with its earlier decision in *Sinclair v. United States*, 279 U.S. 263 (1929). In *Sinclair* the Court had rejected a Sixth Amendment challenge to a trial court's determination of "pertinency" in a criminal contempt proceeding for violation of 2 U.S.C. § 192, which criminalized refusal

by a Congressional witness "to answer any question pertinent to the question under inquiry."[1] While *Sinclair* was "not controlling in the strictest sense, since it involved the assertion of a Sixth Amendment right to have the jury determine, not 'materiality' under § 1001, but rather 'pertinency' under [2 U.S.C. § 192]," the Court nonetheless acknowledged that it "[could not] hold for respondent ... while still adhering to the reasoning and the holding of that case," 515 U.S. at 519–20. The *Gaudin* Court was therefore required to "repudiate" much of the "reasoning" in *Sinclair*. *Id.* at 520. At the same time the Court also repudiated the holdings of eleven circuit courts of appeal, which had held that materiality was a question of law to be decided by the judge. *See* 515 U.S. at 527 (Rehnquist, J., concurring) ("Before today, every Court of Appeals that has considered the issue, except for the Ninth Circuit, has held that the question of materiality is one of law.") (citing *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting) (listing opinions from eleven circuits so holding)).[2] Given the overwhelming, con-

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[1] The statute provided in full:

> "Every person who having been summoned as a witness by the authority of either house of Congress, to give testimony or to produce papers upon any matter under inquiry before either house, or any committee of either house of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months."

279 U.S. at 284 (quoting 2 U.S.C. § 192).

[2] The Ninth Circuit dissent cited the following decisions: *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir. 1985); *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362, 367 (4th Cir. 1985); *United States v. Hausmann*, 711 F.2d 615, 616–17 (5th Cir. 1983); *United States v. Chandler*, 752 F.2d 1148, 1150–51 (6th Cir. 1985); *United States v. Brantley*, 786

trary precedent the *Gaudin* Court overruled, I must conclude that its opinion established a "new" rule which cannot be applied retroactively unless it comes within one of the two exceptions recognized in *Teague* and its progeny[3]—and the *Gaudin* rule does not.

Conceding that the first exception does not apply, Dale asserts that the *Gaudin* rule comes within the second exception as one "requir[ing] the observance of 'those procedures that ... are implicit in the concept of ordered liberty.'" 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693) (internal quotation omitted). In this he errs. The second *Teague* exception is reserved "for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311). The Supreme Court has "usually cited *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Id.* The *Gaudin* rule is not of the same type. It "has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception" and, as the majority opinion demonstrates, its breach "would not seriously diminish the likelihood of obtaining an accurate determination." *Butler v. McKellar*, 494 U.S. 407, 416 (1990). *Gaudin*'s holding therefore is not within the "small core of rules" that implicate the

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F.2d 1322, 1327 & n.2 (7th Cir. 1986); *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980); *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir. 1990); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir. 1984); *United States v. Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985). 28 F.3d at 955.

[3] Dale argues that *Teague* does not prevent retroactive application of new rules in collateral challenges to federal (rather than state-court) convictions. This court, however, has twice recognized *Teague*'s applicability to federal conviction challenges. *See United States v. McKie*, 73 F.3d 1149, 1150 (D.C. Cir. 1996); *United States v. Ayala*, 894 F.2d 425, 429 n.8. (D.C. Cir. 1990).

second *Teague* exception. *See Graham v. Collins*, 506 U.S. 461, 477 (1993) (quoting *Teague*, 489 U.S. at 311).

For the foregoing reasons I believe that the rule announced in *Gaudin* should not be given retroactive effect. *Accord Bilzerian v. United States*, 127 F.3d 237 241 (2d Cir. 1997); *United States v. Swindall*, 107 F.3d 831, 836 (11th Cir. 1997). I would therefore affirm the district court on that basis.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3023 **September Term, 1997**

United States of America, No. 90cr00027-01

Appellee

Filed Apr 24 1998

v.

David M. Dale,

Appellant

Before: WALD, SILBERMAN and HENDERSON, *Circuit Judges.*

ORDER

It is ORDERED by the court that the opinion filed by the court on April 14, 1998 be amended as follow:

Page 2, line 2: Replace "Opinion for the court filed by *Circuit Judge* HENDERSON" with "Opinion for the court filed *Per Curiam*".

Page 2, line 4: Replace "KAREN LECRAFT HENDERSON, *Circuit Judge*" with "*PER CURIAM*".

Per Curiam

For the Court:

Mark Langer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Feb 13 1997

United States of America,

Plaintiff,

v. Criminal No. 90-0027(JGP)

David M. Dale,

Defendant.

MEMORANDUM

This matter is before the Court on Defendant Dale's Motion for Relief from Conviction Pursuant to 28 U.S.C. § 2255. Dale files this motion in light of the Supreme Court's decision in *United States v. Gaudin*,-- U.S. –, 115 S. Ct. 2310 (1995). He argues that this Court erred in not permitting the jury to decode whether his false statements to government agencies were material to those agencies' decision-making. In response, the government argues that *Gaudin* established a new constitutional rule that should not be applied to a case that became final before the announcement of *Gaudin*. The question before this Court is whether *Gaudin* retroactively applies to Dale even though his case became final almost two years before the Supreme Court announced *Gaudin*.

I.

A jury found David Dale guilty of various tax-related crimes

on July 15, 1991.[1] Dissatisfied with the jury verdict, Dale sought review by the Court of Appeals. The Court of Appeals affirmed the verdict below in all respects except for collapsing to counts of the indictment into one because, the Court of Appeals said, two of the criminal offenses should have merged into a single offense.[2] *United states v. Dale*, 301 U.S. App. D.C. 110, 149-150, 991 F. 2nd 819, 859 (1993). The Supreme Court denied *certiorari* in his case on December 13, 1993. *United States v. Dale*, – U.S. –, 114 S. Ct. 650 (1993).

Almost two years after the Supreme Court denied *certiorari* in Dale's case, on June 19, 1995, it announced its decision in *United States v. Gaudin*, – U.S. –, 115 S.Ct. 2310 (1995). That case overruled long-standing Supreme Court and District of Columbia Circuit precedent. The Supreme Court concluded that the jury – not the judge – should determine whether a statement is material when materiality is an element of a crime. *Id.*

In the *Gaudin* case, the defendant had been charged with making false statements to multiple government agencies. *Id.* At –, 115 S.Ct. At 2312. Like this Court at Dale's trial, Gaudin's trial judge concluded that the question of law for the judge to decide. *Id.* At –,

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1 Specifically, the jury found Dale guilty of the following crimes: (1) conspiracy (a) to defend the United States by impeding the Internal Revenue Service's assessment and collection of taxes and (b) to commit other offenses against the United States, violating 18 U.S.C § 7206 (1) (Count One); (2) subscribing to a false tax return, violating 26 U.S.C. § 7206 (1) (Count Two); (3) attempted tax evasion, violating 26 U.S.C. § 7201, and aiding and abetting, violating 18 U.S.C § 2 (Count Four); (4) wire fraud, violating 18 U.S.C. § 1343, and aiding and abetting, violating 18 U.S.C. § 2 (Count Five); (5) concealing material facts by trick, scheme, or artifice, violating 18 U.S.C § 1001 (Count Seven); (6) concealing material facts by trick, scheme, or artifice, violating 18 U.S.C. § 1001 (Count Nine); and (7) making false statements, violating 18 U.S.C. § 1001, and aiding and abetting, violating 18 U.S.C. § 2 (Count Ten).

2On April 6, 1993, the Court of Appeals found that Dale's convictions for subscribing to and aiding the preparation of false tax returns merged into the "capstone" offense of tax evasion. *United States v. Dale*, 301 U.S. App. D.C. 110, 149-150, 991 F. 2nd 819, 859 (1993) (internal quotations omitted). As a result, the lesser included offenses of subscribing and aiding and abetting were vacated on remand to this Court.

15 S.Ct. At 2313. The trial judge found that the defendant's false statements were material and so instructed the jury. *Id.* As was Dale's fate, the jury ultimately found Gaudin guilty. *Id.* At –, 115 S. Ct. at 2312.

On review, the Ninth Circuit Court of Appeals reversed the trial court's ruling on materiality. *Id.* At –. 115, S. Ct. at 2313. The appellate court said that removing the materiality issue from the jury's purview violated Gaudin's Fifth Amendment right to due process and his Sixth Amendment right to a trial by jury. *Id.* The Ninth Circuit's decision eventually found its way to the Supreme Court where the Justices unanimously affirmed it:

> The Constitution [under the Fifth and Sixth Amendments] gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; [Gaudin] therefore had a right to have the jury decide materiality. . . .
>
> . . . .
>
> . . . The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements infringed on that right.

Id. at –, 115 S. Ct. at 2314, 2320. By holding thus, the Supreme Court reversed itself and overruled every circuit that had considered the materiality issue except the Ninth. *Id.* at –, 115 S. Ct. at 2318, 2322.

Notably, while the Supreme Court resolved the materiality issue, it left two other issues unresolved. The high court explicitly declined to decide:

(1) whether materiality is an element of every crime committed under 18 U.S.C. § 1001 (in *Gaudin*, the parties had stipulated that the criminal offense required that the prosecution prove materiality). *Id.*

at –, 115 S. Ct. at 2320;[3]

(2) whether *Gaudin* error is tantamount to harmless error or plain error. *Id.* at –, 115 S.Ct. At 2321.[4]

Because of the Supreme Court's holding in *Gaudin*, Dale has lodged a collateral attack against his judgement of conviction by invoking 28 U.S.C. § 2255. He seeks to have *Gaudin's* materiality rule retroactively applied to his case and, on that basis, requests that this Court vacate each of his convictions.

II.

If *Gaudin* is to be applied retroactively to Dale, it must be done within the constitutional rubric developed by the Supreme Court in *Teague V. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). In that case, the Supreme Court drew a clear line as to when newly announced constitutional rules would apply retroactively to pre-existing cases. Until *Teague*, Supreme Court precedent on retroactive application has been cloudy. But a clearer, more predictable method for determining the appropriateness of retroactive application was necessitated by *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1989), a case that potentially had far-reaching application.

Batson established a new constitutional rule that changed the *prima facie* test for showing racial discrimination in jury selection and banned race-based peremptory challenges. *See Teague,* 489 U. S. at 295, 109 S. Ct. at 1607. The Supreme Court

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3 Dale petitions this Court to vacate each of his convictions and the government largely concedes that materiality is an element of most of the crimes for which Dale was convicted. But the government argues that Dale's convictions for attempted tax evasion (Count Four) and Wire Fraud (Count Five) required no showing of materiality (and were so instructed at trial) and should not be affected by an unfavorable decision. (Government's Opposition to Defendant's Motion for Relief from Conviction Pursuant to 28 U.S.C. § 2255 at 33-36.)

4 Dale does not argue any error standard. Instead, his argument is that he has suffered actual prejudice caused by this Court's failure to allow the jury to decide the materiality issue. (Memorandum in Support of Defendant's Motion for Relief From Conviction Pursuant to 28 U.S.C. § 2255 at 31-33.)

found that *Batson was a* "substantial break with prior precedent." *Id.* (quoting *Allen v. Hardy*, at 478 U.S. 255, 258, 196 S. Ct. 2878, 2880 (1986). And it noted that Teague's conviction had become final two and one-half years prior to *Batson. Id.* The Court concluded that *Batson* should not be retroactively applied to criminal convictions on collateral review; therefore, Teague could not benefit from *Batson's* new jury-selection rule. *Id.*

After denying the applicability of *Batson* to Teague's claim, the Supreme Court went on to articulate a clear standard for when a new constitutional rule should be applied retroactively. It said that a new rule should not be retroactively applied to cases that became final before the new rule's announcement unless the new rule (1) decriminalizes a class of conduct or (2) is a watershed rule of procedure essential to fundamental fairness. *Id.* at 311, 109 S. Ct. at 1075-76.

A. Applicability of Teague v. Lane to Dale's § 2255 Motion

Teague first applied the state-prisoner habeas petitions, but other courts have extended its logic to federal-prisoner habeas petitions under 18 U.S.C. § 2255. *See Nazon v. United States*, 936 F. Supp. 563, 568-569 (N.D. Ind. Aug. 7, 1996) (citing *Van Daahwyk v. United States*, 21 F. 3d 179, 183) (7th Cir. 1994). This Court finds that the *Teague* doctrine applies to Dale's habeas petition.

1. Is Gaudin a New Rule under Teague?

Dale contends that *Gaudin* does not establish a new constitutional rule. (Reply Memorandum in Support of Defendant's Motion for Relief from Conviction Pursuant to 28 U. S. *C.* § 2255 [hereinafter Defendant's Reply].) The Supreme Court said in *Teague* that "a case announces a new [constitutional] rule when it breaks new ground or imposes a new obligation on the States ir the Federal Government." *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070. Alternatively, a new rule exists if it "was not dictated by precedent existing at the time the defendant's conviction became final." *Id.*

Gaudin established a new constitutional rule. *See United States v. Bilzerian*, 1996 WL 524340, at *14 (S.D.N.Y. Sept. 13, 1996) ("*Gaudin* is clearly a new rule for retroactivity purposes.")' *Waldemer v. United States*, 911 F. Supp. 1105, 1113 (S.D. III. 1996)

(holding same); *United States v. Holland*, 919 F. Supp. 431, 434 (N. D. Ga. 1996) (holding same), *aff'd*, 85 F. 3d 643 (11th Cir. 1996). First, it broke new ground by reversing both Supreme Court and District of Columbia Circuit precedent. Second, since *Gaudin* directly opposed earlier precedent, the state of the law before *Gaudin's* announcement could not have dictated *Gaudin's* holding. *Gaudin* is a new rule within the meaning of *Teague*.

2. Is Dale's Case "Final" Under Teague?

Final cases on collateral review generally should not benefit from newly announced law. The rational behind that rule focuses on deterrence and was best summarized by the Supreme Court:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to . . . our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.

Teague, 489 U.S. at 309, 109 S. Ct. at 1074.

The Supreme Court has deemed "final determination" to mean cases "where the judgement of conviction was rendered, the availability of appeal exhausted, and the time petition for certiorari [] elapsed." *Id.* at 295, 109 S. Ct. at 1067 (internal quotation marks omitted). Here, in *Dale*, the jury entered its verdict on July 23, 1990. The Court of Appeals affirmed that verdict on April 6, 1993, in all respects except one. Then, the Supreme Court denied *certiorari* on December 13, 1993, thereby exhausting Dale's direct appeal. On December 13th, Dale's conviction became final under *Teague*.

Furthermore–taking a hint from Dale's choice of motions – a § 2255 motion is a habeas corpus petition which by its very nature denotes finality of judgement and exhaustion of direct appeals. As *Teague* explains, "[h]abeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgements that have become otherwise final." *Teague*, 489 U.S. at 306, 109 S. Ct. at

1073 (quoting *Mackey v. United States*, 401 U.S. 667, 682, 91 S. Ct. 1160, 1175 (1971). Under *Teague*, Dale's case is final.

III.

A. The Teague Exceptions

The announcement of new constitutional rules will have no retroactive impact on final cases unless one of two exceptions apply: the new rule decriminalizes a class of conduct or it is a watershed rule of fundamental fairness. Thus far, this Court has drawn three conclusions: (1) that *Teague* applies to federal § 2255 motions, (2) that *Gaudin* announces a new rule, and (3) that Dale's judgement of conviction is final. Since new rules do not apply to pre-existing final cases, "the habeas court need only the constitutional standards that prevailed at the time the original proceeding took place." *Id.* (Citation omitted). In other words, the state of the law is frozen at the time a case becomes final unless the case fits a *Teague* exception.

1. *Gaudin's* New Rule Does Not Decriminalize a Class of Conduct

Gaudin cannot fit into the first exception, and Dale does not argue that it does. *Gaudin* does not decriminalize a class of conduct or shield a class of people from punishment. *Accord Nazon*, 936 F. Supp. At 569 (citing *United States v. Holland,* 919 F. Supp. 431, 434 (N. D. Ga. 1995); *Bilzerion*, 1996 WL 524340, at *14. Rather, *Gaudin* is procedural in nature and has no affect on the criminal conduct for which Dale was convicted. It takes the materiality issue from the judge and gives it to the jury. Therefore, *Gaudin's* new rule cannot fit into the first exception.

2. *Gaudin's* New Rule is Not a Watershed Rule of Fundamental Fairness

The second exception applies to new rules that increase verdict accuracy and are essential to ensuring fundamental fairness. *Sawyer v. Smith,* 497 U.S. 227, 241-42, 110 S. Ct. 2822, 2831 (1990). Trading the judge for the jury as the determiner of the materiality issue as *Gaudin* does, does not increase the likelihood of

accurate verdicts of guilt or innocence, nor does ir "alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Id.* at 242, 110 S. Ct. 2831 (quoting *Teague*, 489 U. S. at 311, 109 S. Ct. at 1096 (citations omitted).

Dale argues that nothing can be more fundamental to a fair trial than the right to have the jury decide every element of the crime charged. (Defendant's Reply at 9.) That argument only addresses one part of the two requirements for a new rule to fit into the second exception. In addition to fundamental fairness concerns, the new rule must also increase verdict accuracy. Dale has not shown that a judge deciding the materiality of a statement is less accurate than a jury. Indeed, judges may be more accurate than juries in deciding the materiality issue. Moreover, it does not necessarily follow that because judges and juries may use different approaches in deciding the materiality issue that they in fact would arrive at different conclusions.

Finally, every subsequent refinement to a watershed rule does not qualify for the second exception. Consider the point made by the Seventh Circuit in *Jones v. Page*, 76 F. 3d 831 (7th Cir. 1996), referring to *Gideon v. Wainright*, 372 U.S. 335, 83 S. Ct. 792 (1963):

> By citing *Gideon* as an example, the [Supreme] Court did not suggest that
>
> > *all* cases expanding or defining the right to counsel would fall within the [second *Teague*] exception. Rather, the Court made clear that only those cases that truly break new constitutional ground, such as *Gideon*, require retroactive application.

Jones, 76 F. 3d at 854. The Seventh Circuit's point is clear: only a very narrow class of rules fit into the second *Teague* exception. *Gaudin* does not comfortably fit within that exception. *See Bilzerian*, 1996 WL 524340, at *14.

Because this Court concludes that *Gaudin* should not be retroactively applied to Dale's case, his conviction stands. An appropriate Order has been entered.

Date: Feb 13 1997

JOHN GARRETT PENN
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3023 **September Term, 1997**

United States of America, No. 90cr00027-01

Appellee

Filed Jun 18 1998

v.

David M. Dale,

Appellant

Before: WALD, SILBERMAN and HENDERSON, *Circuit Judges.*

ORDER

Upon consideration of appellant's petition for rehearing filed May 29, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner
Deputy Clerk

(2)

FILED
NOV 18 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-457

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAVID M. DALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's error in failing to submit to the jury the element of materiality under 18 U.S.C. 1001 (1988) resulted in actual prejudice to petitioner sufficient to excuse his procedural default of that claim.

2. Whether the doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989), that new rules of criminal procedure are generally unavailable to prisoners seeking collateral review, applies to federal convictions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bilzerian v. *United States*, 127 F.3d 237 (2d Cir. 1997), petition for cert pending, No. 97-1892	9
Bousley v. *United States*, 118 S. Ct. 1604 (1998)	5, 9
Gilberti v. *United States*, 917 F.2d 92 (2d Cir. 1990)	9
Hendeson v. *Kibbe*, 431 U.S. 145 (1977)	7
Johnson v. *United States*, 520 U.S. 461 (1997)	4, 7
Lambrix v. *Singletary*, 520 U.S. 518 (1997)	8
Mackey v. *United States*, 401 U.S. 667 (1971)	8
Murray v. *Carrier*, 477 U.S. 478 (1986)	7
Teague v. *Lane*, 489 U.S. 288 (1989)	8
United States v. *Frady*, 456 U.S. 152 (1982)	4, 5, 6, 9
United States v. *Gaudin*, 515 U.S. 506 (1995)	3
United States v. *Martinez*, 139 F.3d 412 (4th Cir.), petition for cert. pending, No. 98-5677	9
United States v. *Shunk*, 113 F.3d 31 (5th Cir. 1997)	9
United States v. *Swindall*, 107 F.3d 831 (11th Cir. 1997)	9
Van Daalwyk v. *United States*, 21 F.3d 179 (7th Cir. 1994)	9
Waldemar v. *United States*, 106 F.3d 729 (7th Cir. 1996)	7, 8

Constitution and statutues: Page

U.S. Const.:
Amend. V 3
Amend. VI 3
Internal Revenue Code (26 U.S.C.):
§ 7201 2
§ 7206(1) 2
18 U.S.C. 2 2
18 U.S.C. 371 2
18 U.S.C. 1001 (1988) 2, 3
18 U.S.C. 1343 (1988) 2
28 U.S.C. 2255 (Supp. II 1996) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-457

DAVID M. DALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a13) is reported at 140 F.3d 1054. The district court's opinion (Pet. App. a14-a22) is unreported. The opinion of the court of appeals affirming petitioner's conviction on direct appeal is reported at 991 F.2d 819, and the district court's opinion denying petitioner's motions to dismiss is reported at 782 F. Supp. 615.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1998. A petition for rehearing was denied on June 18, 1998 (Pet. App. a23). The petition for a writ of certiorari was filed on September 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of conspiracy to defraud the United States and to commit various tax and false statement offenses, in violation of 18 U.S.C. 371; one count of subscribing to a false tax return, in violation of 26 U.S.C. 7206(1); one count of attempted tax evasion and aiding and abetting that offense, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2; one count of wire fraud and aiding and abetting that offense, in violation of 18 U.S.C. 1343 (1988) and 2; two counts of concealing facts by trick, scheme, and artifice and aiding and abetting that offense, in violation of 18 U.S.C. 1001 (1988) and 2; and one count of making false statements and aiding and abetting that offense, in violation of 18 U.S.C. 1001 (1988) and 2. Pet. App. a3. Petitioner was sentenced to 41 months' imprisonment on the conspiracy count, and concurrent prison terms of 30 months each on the other counts, to be followed by two years' supervised release. *Ibid.* He was also ordered to pay a $350 special assessment, a $675,000 fine, and a $58,000 assessment for costs of incarceration. *Ibid.* The court of appeals affirmed all convictions except one, and remanded for resentencing. *Ibid*; *United States* v. *Dale*, 991 F.2d 819 (D.C. Cir. 1993). This Court denied review. Pet. App. a3; *Dale* v. *United States*, 510 U.S. 1030 (1993).

In 1996, petitioner filed a motion under 28 U.S.C. 2255 (Supp. II 1996) to vacate his convictions. The district court denied the motion (Pet. App. a14-a22), and the court of appeals affirmed (Pet. App. a1-a13).

1. Petitioner and three other officers of Automated Data Management, Inc. (ADM) conspired to cause companies in Europe and Asia that they owned or con-

trolled to bill ADM for work that had not been done. They further conspired to deduct the payments made by ADM to the overseas companies as legitimate business expenses, thereby reducing ADM's tax liability. Petitioner and his co-conspirators were charged with tax fraud and related offenses for preparing ADM's false 1986 corporate tax return and for making false certifications to the Department of Defense concerning their interest in foreign companies. See Gov't C.A. Br. 2; 991 F.2d at 826-831.

With respect to the counts charging petitioner with false statements in violation of 18 U.S.C. 1001 (1988), the district court treated the issue of materiality as an issue for the court rather than the jury to determine. The court instructed the jury that the misrepresentations were material. Pet. App. a3. The jury found petitioner guilty on all counts. *Ibid.*

Petitioner challenged his convictions on direct appeal, but he did not claim that the district court erred in failing to submit the issue of materiality to the jury. See Pet. App. a3-a4; 991 F.2d at 831-839, 850-853. The court of appeals affirmed petitioner's convictions with one exception not relevant here and remanded for resentencing. Pet. App. a3; 991 F.2d at 858-859. This Court denied review. 510 U.S. at 1030. Petitioner was resentenced, and he did not appeal from the new sentence. Pet. App. a3-a4.

2. After petitioner's convictions became final, this Court held in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that the Fifth and Sixth Amendments to the Constitution require the jury to determine the issue of materiality under 18 U.S.C. 1001 (1988). Petitioner subsequently filed a motion under 28 U.S.C. 2255 (Supp. II 1996) to vacate his convictions under 18 U.S.C. 1001 (1988), contending that the district court erred in failing

to require a jury finding of materiality. Pet. App. a4. The district court denied relief, holding that *Gaudin* established a new rule of criminal procedure that could not be applied retroactively to criminal convictions that were already final when this Court issued its decision. *Id.* at a14-a22.

The court of appeals affirmed, Pet. App. a1-a13, but on a different ground. Without reaching the retroactivity issue, the court of appeals held that petitioner was procedurally barred from raising the *Gaudin* error on collateral review. The court noted that, because petitioner had failed to raise the materiality issue at trial or on direct review, he was required to demonstrate both cause and actual prejudice in order to excuse his procedural default. Pet. App. a4 (citing *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982)). Noting that petitioner had "suggested no facts or theory to rebut the district judge's legal conclusion that the charged nondisclosures were material," the court of appeals concluded that petitioner had failed to establish that the district court's failure to submit the issue of materiality to the jury resulted in actual prejudice. Pet. App. a5.

The court rejected petitioner's contention that *Gaudin* error is per se prejudicial, entitling him to relief on collateral review notwithstanding his procedural default. The court noted that this Court held in *Johnson* v. *United States*, 520 U.S. 461 (1997), that a *Gaudin* error does not require reversal under the plain error standard when the defendant can present no plausible argument that the false statements are not material. The court of appeals reasoned that "the same error can in similar circumstances be nonprejudicial under the *habeas* standard which requires a showing of prejudice that is significantly greater than that neces-

sary under the more vague inquiry suggested by the words plain error." Pet. App. a6 (internal quotation marks omitted).

Judge Henderson concurred in the majority's holding that petitioner had not demonstrated actual prejudice. Judge Henderson also would have held that *Gaudin* established a new rule of constitutional procedure that did not apply retroactively to petitioner's convictions. Pet. App. a8-a12.

ARGUMENT

1. Petitioner challenges (Pet. 10-16) the court of appeals' holding that he was procedurally barred from raising his *Gaudin* claim on collateral review, because he failed to show that the district court's *Gaudin* error caused him actual prejudice. The court of appeals correctly resolved that issue, and it does not warrant further review.

Petitioner failed to raise his claim that the district court was required to submit the issue of materiality to the jury either at trial or on direct review. Petitioner was therefore precluded from raising his claim on collateral review, unless he could establish both that there was sufficient cause for his procedural default and that the error caused him actual prejudice. *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982). As the court of appeals concluded, petitioner failed to make a showing of prejudice under that standard.[1] In particular, because the district court found that petitioner's false statements were material and petitioner "suggested no facts or theory" to rebut that finding, Pet.

[1] The court of appeals did not reach the issue whether petitioner had shown "cause" for his default, see Pet. App. a5 n.4, but it is clear that he could not meet that burden either. See *Bousley* v. *United States*, 118 S. Ct. 1604, 1611 (1998).

App. a5, petitioner failed to establish that the district court's error caused him actual prejudice.

Petitioner argues (Pet. 10-14) that the failure to submit the question of materiality to the jury is structural error that is not amenable to harmless error review and that there is a conflict in the circuits on that issue. On October 13, 1998, this Court granted review to resolve the conflict identified by petitioner. *Neder* v. *United States*, No. 97-1985 (granting certiorari on the question whether "the trial court's failure to instruct the jury on the materiality element in this case was harmless error because materiality was not in dispute at trial"). There is no reason, however, to hold this case pending the resolution of that conflict. The conflict identified by petitioner concerns whether harmless error analysis applies when the defendant objects at trial to the court's failure to submit the issue of materiality to the jury and then raises the issue on direct review. Petitioner, by contrast, failed to raise the error he now asserts either at trial or on direct review. Instead, he raised his claim of error for the first time on collateral review. In those circumstances, the question is not whether a *Gaudin* error is subject to harmless error analysis, but whether petitioner has made the kind of showing of actual prejudice that would excuse his procedural default—a showing that is far more difficult for a defendant to make than that required to obtain reversal of a conviction on direct appeal. See *Frady*, 456 U.S. at 166-168.

Petitioner also contends (Pet. 14-16) that a *Gaudin* error constitutes per se actual prejudice under *Frady*, entitling him to reversal of his conviction notwithstanding his procedural default. As the court of appeals noted (Pet. App. a5-a6), this Court rejected a similar contention in *Johnson*. There, the Court held that a

defendant who did not object to a district court's failure to submit materiality to the jury was not entitled to a reversal of his conviction on direct appeal under the plain error standard where the defendant could make no plausible claim that his false statements were not material. 520 U.S. at 470. Although *Johnson* relied on the fourth prong of plain error analysis (whether the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" (*ibid.*)), and this case involves the prejudice prong under *Frady*, a similar analysis applies in both contexts. Since petitioner did not raise his claim either at trial or on direct appeal, and he has suggested no plausible basis for a finding that his false statements were not material, he is not entitled to relief on collateral review. Indeed, since a defendant seeking to obtain relief on collateral review must ordinarily make a substantially greater showing than that required to obtain relief under the plain error standard (*Murray* v. *Carrier*, 477 U.S. 478, 493-494 (1986); *Frady*, 456 U.S. at 166; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977)), that conclusion would seem to follow *a fortiori* from this Court's decision in *Johnson*.

Petitioner contends (Pet. 14) that the decision below conflicts with *Waldemer* v. *United States*, 106 F.3d 729 (7th Cir. 1996). But that case predated this Court's decision in *Johnson*, and the Seventh Circuit has not revisited the question since *Johnson*. In any event, the decision in *Waldemer* does not conflict with the decision below. In holding that a *Gaudin* error required setting aside a defendant's conviction on collateral review, the Seventh Circuit emphasized that no finding of materiality had been made by either the district court or the jury. 106 F.3d at 732, 735-736. The court expressly distinguished a prior Seventh Circuit case

holding that a *Gaudin* error did not constitute plain error on the ground that the district court in that case had made a finding of materiality. *Id.* at 732. Since the district court in this case made a finding of materiality, *Waldemer* is inapposite here.

2. Petitioner contends (Pet. 16-20) that the Court should grant review to decide whether the principle of *Teague* v. *Lane*, 489 U.S. 288 (1989)—that new rules of criminal procedure are generally not retroactive to cases on collateral review—applies to federal as well as state convictions. The court of appeals in this case, however, did not hold that petitioner was barred by *Teague* from seeking collateral relief. The court instead held that petitioner procedurally defaulted on his claim by failing to raise it at trial or on direct appeal. Cf. *Lambrix* v. *Singletary*, 520 U.S. 518, 524-525 (1997) (in federal habeas, procedural default should generally be resolved before addressing *Teague* issues). This case therefore does not present the question whether *Teague* applies to federal convictions.

In any event, petitioner's claim that *Teague* does not apply to federal convictions is without merit. Although *Teague* involved a state habeas petitioner, the same finality considerations that animated that decision apply equally to federal convictions. Indeed, the plurality's analysis in *Teague*, 489 U.S. at 311-316, drew largely on Justice Harlan's opinion in *Mackey* v. *United States*, 401 U.S. 667, 675-702 (1971) (concurring in the judgments in part and dissenting in part), a federal habeas case in which Justice Harlan stated that no distinction should be drawn, "for retroactivity purposes, between state and federal prisoners seeking collateral relief." 401 U.S. at 681-682 n. 1. This Court has rejected the claim that it should distinguish between federal and state prisoners when applying the

procedural default limitations on the scope of habeas relief, on the ground that "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." See *Frady*, 456 U.S. at 166. And, as petitioner concedes (Pet. 17), this Court's recent holding in *Bousley* v. *United States*, 118 S. Ct. 1604, 1609-1610 (1998), that *Teague* does not apply to rulings that decide the substantive meaning of a federal statute rests on the understanding that the *Teague* standard is applicable to federal convictions.

The courts of appeals, moreover, have consistently held that *Teague* applies to federal as well as to state prisoners. *United States* v. *Martinez*, 139 F.3d 412, 416 (4th Cir.), petition for cert. pending, No. 98-5677; *United States* v. *Swindall*, 107 F.3d 831, 834 n.4 (11th Cir. 1997); *Van Daalwyk* v. *United States*, 21 F.3d 179, 181-183 (7th Cir. 1994); *Gilberti* v. *United States*, 917 F.2d 92, 94-95 (2d Cir. 1990). The reasoning of those courts is sound. "[T]he primary reason for restricting collateral review—the goal of finality—is common to both federal and state applications." *Gilberti*, 917 F.2d at 94. And "[a] consistent and principled approach to retroactivity requires that all questions of retroactivity be resolved by reference to one standard." *Van Daalwyk*, 21 F.3d at 183. Petitioner's contention that *Teague* does not apply to federal convictions therefore does not warrant review.[2]

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[2] As Judge Henderson concluded (Pet. App. a8-a12), *Gaudin* is a new rule of criminal procedure within the meaning of *Teague*, and therefore does not apply to convictions like petitioner's that were final at the time of the decision. Every court of appeals that has addressed the question has reached the same conclusion. *Bilzerian* v. *United States*, 127 F.3d 237, 240-241 (2d Cir. 1997), petition for cert. pending, No. 97-1892; *United States* v. *Shunk*, 113

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1998

F.3d 31, 34-37 (5th Cir. 1997); *United States* v. *Swindall*, 107 F.3d at 836.

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No. 98-457

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

DAVID M. DALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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November 30, 1998

588

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-457

DAVID M. DALE,
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UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

Petitioner David M. Dale respectfully submits this reply brief in response to the Brief for the United States in Opposition (hereinafter cited as "Br. Opp."), which was served in final form on November 20, 1998.[1]

ARGUMENT

1. A. On the first question presented by the Petition, the government concedes that there is an existing conflict among the Circuits, and notes that this Court recently granted review to resolve that conflict (Br. Opp.6), in *Neder v. United States,* 119 S. Ct. 334 (October 13, 1998), approximately one

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[1] Preliminary typewritten copies of the brief in opposition were served on November 18, 1998.

month after the instant Petition was filed. The government argues that the pendency of *Neder* is a reason for denying review in this case (Br. Opp.6-8). However, considerations of both fairness and sound judicial administration counsel otherwise.

As the government notes, *Neder* is a direct review case, *see United States v. Neder,* 136 F.3d 1459 (11th Cir. 1998), whereas the instant Petition arises on collateral review under 28 U.S.C. § 2255. Far from supplying a reason for denying review here, the distinct procedural postures of the two cases support granting review in both cases, so as to allow this Court to render a comprehensive opinion concerning the classification of *Gaudin* error under the various error formulations applied on direct and collateral review.

Plainly, the lower courts are in need of guidance concerning the similarities and distinctions among harmless-error analysis, "actual prejudice" under *United States v. Frady,* 452 U.S. 152 (1982), "plain error" as construed in *United States v. Olano,* 507 U.S. 725 (1993), and more recently in *Johnson v. United States,* 520 U.S. 461 (1997), and "structural error" as articulated in *Sullivan v. Louisiana,* 508 U.S. 275 (1993), particularly as applied to a *Gaudin*-type error involving the failure to submit an essential element of a crime for jury determination. As was noted in the Petition (*see* Pet.12-13), this Court's address to the subject in *Johnson* appears to have deepened rather than resolved the subsisting conflict among the Circuits.

Having now decided in *Neder* to take up the question for review, this Court also should grant review in this case, in the interest of sound judicial administration in the supervision of the lower courts. Sound exercise of this Court's certiorari

jurisdiction implies that the Court should, where possible, seek to issue a more comprehensive opinion once it has decided to engage on a particular topic, so as to avoid the need to grant certiorari on related questions in the near future. The pendency of both *Neder* and the instant Petition gives this Court with the opportunity to issue a more comprehensive and non-advisory opinion on the underlying question, which supplies an addition reason for granting review here.

B. As in the opinion below, the government's brief in opposition relies in part upon an assumed relationship between direct and collateral review standards, on the grounds of dicta from some of this Court's previous opinions (Br. Opp.6-7; *see also* Pet.15). Only by granting joint consideration of both direct and collateral review cases may this Court finally determine the authority of those dicta. On the merits, we believe that the Court should not adhere to any strict hierarchy between direct and collateral review standards, given the distinct functions of those procedures (*see* Pet.15-16). But the question can never be resolved authoritatively in the absent of the joint review of both types of cases together.

2. On the second question presented for review — the applicability of the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), to federal prisoner motions under 28 U.S.C. § 2255 — the government's brief simply misses the point, on several levels. This question is not the subject of conflict among the circuits, but it has profound consequences for the structure of our constitutional government, and therefore should be resolved by this Court, especially given its nearly-routine occurrence in the daily administration of justice.

Nearly ten years now have passed since the *Teague* doctrine was announced, but as applied to federal prisoners, it

lacks a constitutional foundation; it lacks a basis in the applicable statutory language of § 2255, as previously construed by this Court in *Davis v. United States*, 417 U.S. 333, 344-45 (1974); and it lacks a basis in sound policy as applied to federal prisoner cases (*see* Pet.18-20). The government's brief in opposition makes no response to any of these points (*see* Br. Opp.8-9), and there is no response to be made, because none of the reported decisions analyze these questions beyond the point of asserting the interest in "finality" of federal criminal judgments. We do not dispute that there is such an interest. But it is not an absolute, and it does not answer any of the issues raised by the extension of *Teague* to federal prisoners, which is a decision that has never been made by this Court, and can only be made by this Court.

Either *Teague* rests upon federal-state comity interests, as the opinion itself says, or it does not. If not, then what constitutional principle elevates "finality" above the Bill of Rights? If *Teague* is an application of § 2255, then how can it be reconciled with the language of that statute, as construed by this Court in *Davis*? And what is the purpose of applying *Teague* to federal prisoners in any case, given that § 2255 motions by federal prisoners serve a broader and different function than § 2254 petitions by state prisoners? These questions have not been answered by the lower courts, and can only be answered definitively by this Court. These questions are of exceptional importance and broad application in the administration of criminal justice in the federal courts, and should be settled by this Court.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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November 30, 1998